



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF GOGOLADZE v. GEORGIA

(Application no. 4683/03)

JUDGMENT

STRASBOURG

11 December 2007

FINAL

11/03/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gogoladze v. Georgia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mrs F. TULKENS, *President*,

Mr I. CABRAL BARRETO,

Mr R. TÜRMESEN,

Mr M. UGREKHELIDZE,

Mr V. ZAGREBELSKY,

Mrs A. MULARONI,

Mrs D. JOČIENĖ, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 20 November 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 4683/03) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Ms Nunu Gogoladze, a Georgian national, on 17 January 2003. She was represented by Ms L. Mukhashavria and Mr V. Vakhtangidze, lawyers practising in Tbilisi.

2. The Georgian Government (“the Government”) were represented by their Agent, Ms I. Bartaia of the Ministry of Justice.

3. On 27 January 2006 the Court decided to communicate to the Government the complaint concerning the absence of an oral hearing before the Supreme Court. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

4. The Government and the applicant each filed observations on the admissibility and merits of the application (Rule 54A of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in Tbilisi. She worked as a technician in a State company specialising in the production of jewellery.

6. By an administrative order of 1 August 2001, the company dismissed the applicant on account of her unauthorised absence on 26 July 2001, coupled with the fact that a disciplinary reprimand for professional negligence had been already been imposed on her on 9 July 2001. In response, the applicant sued the company for unlawful dismissal.

7. At a hearing on 11 October 2001, which was not attended by the respondent company, the Didube-Chughureti District Court in Tbilisi found in the applicant's favour by default.

8. In an interlocutory appeal dated 18 October 2001, the respondent company complained that the summons had not been served on its representative and requested that the default judgment of 11 October 2001 be annulled.

9. On 22 October 2001 the Didube-Chughureti District Court, dispensing with an oral hearing, acknowledged its failure to serve the summons on the respondent company's representative, annulled the default judgment of 11 October 2001 and scheduled another hearing on the merits.

10. On 3 December 2001 at an oral hearing the Didube-Chughureti District Court dismissed the applicant's claim. The court found it established that on 26 July 2001 she had been absent from work without leave. Taking into account the fact that she had received a previous disciplinary sanction, the court concluded that the dismissal was in compliance with Article 34 § 1 (g) of the Labour Code ("the LC").

11. In an appellate decision of 6 March 2002, the Tbilisi Regional Court, noting that the first instance court had fully established the circumstances of the case and correctly applied the law, upheld the judgment of 3 December 2001. The decision was based on both parties' written and oral submissions.

12. On 4 June 2002 the applicant lodged a cassation claim. She complained that the respondent company's representative had not had an appropriate power of attorney at first instance. She further complained that the Didube-Chughureti District Court had set aside the default judgment of 11 October 2001 without holding an oral hearing. Finally, she challenged the lower courts' reading of the LC and claimed that the disciplinary reprimand of 9 July 2001 had been arbitrarily imposed on her.

13. On 17 June 2002 the Supreme Court of Georgia decided to declare the cassation claim admissible and to dispense with an oral hearing on the merits under Article 408 § 3 of the Code of Civil Procedure ("CCP"). This decision was communicated on the same day to both parties; the respondent company was served with a copy of the applicant's cassation claim as well.

14. On 24 June 2002 the applicant requested the Supreme Court to reconsider its decision regarding an oral hearing. She stated that her oral pleadings, bearing on some particularly technical issues concerning jewellery production, could better demonstrate that the earlier disciplinary reprimand of 9 June 2001 had been wrongly imposed.

15. On 2 July 2002 the respondent company filed submissions in reply to the applicant's cassation claim. This reply, addressing only the factual circumstances of the case, was not communicated to the applicant.

16. On 8 July 2002 the applicant maintained before the Supreme Court her request for an oral hearing.

17. On 19 July 2002 the Supreme Court, dispensing with a hearing, dismissed the applicant's cassation claim and upheld the appellate decision of 6 March 2002. It reasoned that the applicant lacked standing to challenge the authority of the respondent company's representative, this prerogative being reserved to the company itself. In any case, the complaint was ill-founded, as the case file disclosed a copy of a duly completed letter of authority.

As regards the first instance court decision to set aside the default judgment without holding a hearing, the Supreme Court acknowledged that it constituted a procedural breach. That breach, however, did not justify cassation, as it could not be said to have resulted in an erroneous decision within the meaning of Article 393 § 3 of the CCP. Even if an oral hearing had been held, the failure to serve the summons on the respondent company would still have been a legitimate ground for setting aside the default judgment of 11 October 2001. As to the complaint about the earlier reprimand, the Supreme Court refused to hear it since it went beyond the subject of the present dispute – the lawfulness of the dismissal on 1 August 2001 – and had never been raised by the applicant either before the first instance or the appellate courts.

18. In the decision of 19 July 2002, the Supreme Court did not take into account any of the arguments contained in the respondent company's submissions of 2 July 2002; its reasoning solely addressed the issues raised in the applicant's cassation claim. The decision was communicated to both parties on 26 July 2002.

II. RELEVANT DOMESTIC LAW

19. *The Labour Code, in force at the material time*

Under Article 34 § 1 (g), an employee could be dismissed for taking unauthorised leave, providing a previous disciplinary sanction had already been imposed on him or her.

20. *The Code of Civil Procedure, as it stood at the material time*

Article 83 § 1

“The parties have equal procedural rights. They can consult the case file [and] make extracts from or copies of the materials...”

Pursuant to Article 393 §§ 1 and 2, only the lawfulness of an appellate judgment could be challenged in cassation. The disputed judgment could be found to be unlawful if the appellate court had wrongly applied or interpreted the law. Pursuant to Article 393 § 3, a procedural violation could be a ground for cassation only if it had caused the delivery of an incorrect appellate decision.

Article 396 § 1 (f) required the appellant to mention in his or her cassation claim those facts which supported the alleged breaches of procedural law if the cassation claim was calling into question the application of procedural legal provisions.

Article 400 stated that a copy of the cassation claim with all the supporting documents should be forwarded to the adversary. The cassation court could set a time-limit for the submission of a reply. The provision remained silent, however, as to whether the adversary's reply should also be transmitted to the appellant.

Article 404 § 1

“The cassation court shall review the [disputed] judgment only in so far as challenged in the cassation claim. The cassation court cannot go beyond the facts referred to under Article 396 § 1 (f) and inquire of its own motion into other procedural breaches.”

Article 407 §§ 1 and 2

“The cassation court shall take into account the party's submissions only in so far as disclosed by the case file or the appellate judgment; only the facts submitted under Article 396 § 1 (f) can be taken into account.

The establishment of the facts [by the appellate court] is binding on the [cassation] court, unless an additional and well-founded cassation argument has been raised.”

Article 408 § 3

“In the event the cassation court finds it appropriate..., it can decide the case without an oral hearing. The parties shall be notified of such a decision.”

Article 411

“The cassation court shall take a [final] decision itself if the circumstances of the case have been established by the appellate court without procedural breaches and there is no need for additional fact finding.”

21. *The Supreme Court's practice*

In its judgment of 28 February 2006 in the case of “*Gokhi*” v. “*Telasi*” JSC, the Supreme Court defined the notion of an “additional and well-founded cassation argument” (Article 407 § 2 of the CCP), as follows:

“...‘An additional and well-founded cassation argument’ is ... a reference to those procedural breaches which, having been committed by the appellate court during the examination of the case, have resulted in an erroneous assessment of matters of fact and/or the incorrect interpretation and application of substantive legal provisions.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

22. The applicant complained, under Article 6 § 1 of the Convention, that the Supreme Court of Georgia had dispensed with an oral hearing in her case. She further challenged the outcome of the proceedings, claiming that the Supreme Court had failed to take account of some important circumstances. The invoked provision, in its relevant part, reads as follows:

“In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing...”

23. The Government submitted that, under Georgian law, the primary role of the Supreme Court in cassation was to review the lawfulness of appellate decisions. It was because of the nature of cassation proceedings that Article 408 § 3 of the CCP had been enacted. Thus, where the cassation court could not inquire into the circumstances of a case and was only called upon to assess the already established facts from a legal point of view, the parties' participation at an oral hearing might not always be necessary. This rule could be justified by such legitimate considerations as the right to a hearing within a reasonable time and the demands of economy.

24. The Government contended that, in the present case, the Supreme Court had only to inquire into the lawfulness of the appellate judgment. It could not re-examine the factual circumstances of the case, as requested by the applicant. The cassation court was not even called upon to assess the facts relating to alleged procedural breaches, as no such “cassation argument” (*sakasacio pretenzia*) had been raised by the applicant. In the Government's view, the inquiry into the points of law in the light of the already established facts was fully possible on the basis of the applicant's written observations and case materials. Moreover, the applicant had been informed in advance of the decision to dispense with an oral hearing.

25. The Government further submitted that the reason why the respondent company's reply to the applicant's cassation claim had not been communicated to her prior to the delivery of the final decision of 19 July 2002 was that Article 400 of the CCP did not oblige the Supreme Court to do so. In any case, had the applicant wished to have knowledge of the respondent company's submissions, she could have consulted the case file pursuant to Article 83 § 1 of the CCP.

26. In the light of the foregoing, the Government argued that the absence of an oral hearing before the Supreme Court could not be said to have breached any of the safeguards of Article 6 § 1 of the Convention.

27. The applicant replied that Article 408 § 3 of the CCP lacked clarity and foreseeability, as it did not specify the circumstances under which the cassation court could dispense with an oral hearing. She further complained that the above provision did not oblige the cassation court to give reasons for such a decision or provide for an appeal. Moreover, none of the provisions of the CCP obliged the cassation court to give notice of its decision to dispense with an oral hearing prior to the delivery of a final decision in the case. The alleged shortcomings of Article 408 § 3 resulted in the Supreme Court's practice to dispense with oral hearings in an arbitrary manner, as in her case.

28. The applicant further submitted that, as certain technical issues were involved, an oral hearing where she could plead in person was indispensable for the correct and fair examination of her case. Moreover, had she been allowed to address orally the Supreme Court, she could have shown better that the participation of the respondent company's representative without proper authority was a grave procedural violation and justified the quashing of the appellate judgment. Finally, agreeing with the Government that the CCP did not oblige the cassation court to forward the respondent's reply to the appellant in cassation, she claimed that this "procedural shortcoming", coupled with the absence of a hearing, had undermined her rights under Article 6 § 1 of the Convention.

A. Admissibility

1. As to the complaint about the outcome of proceedings

29. By calling into question the outcome of the proceedings, the applicant requests the Court to act as an appeal court of "fourth instance". However, the Court reiterates that the domestic courts are best placed to assess the relevance of evidence to the issues in the case and to interpret and apply the rules of substantive and procedural law (see, amongst many authorities, *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 32; *Gurepka v. Ukraine*, no. 61406/00, § 45, 6 September 2005). Insofar as the relevant domestic decisions do not

disclose any manifestly arbitrary reasoning, the Court considers that this limb of the applicant's complaint under Article 6 § 1 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. As to the complaint about the absence of an oral hearing in cassation

30. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

31. The Court recalls that, in the case of *Rizhamadze v. Georgia*, it has already found that the Georgian Supreme Court's power, derived from Article 408 § 3 of the CCP, to dispense with an oral hearing in cassation does not *per se* constitute a violation of Article 6 § 1 of the Convention. This is justified by the role of cassation proceedings in the respondent State, which is essentially to address the points of law raised in a case, and the fact that hearings as a rule take place before the lower instances (see *Rizhamadze v. Georgia*, no. 2745/03, §§ 35-39, 31 July 2007).

32. As to the circumstances of the present case, the Court notes that hearings were held at the first two levels of jurisdiction. Consequently, the Court agrees with the Government that the right to an oral hearing in cassation could be outweighed by the demands of diligence and economy (see, *Rizhamadze*, cited above, § 39). As to the applicant's arguments that her oral pleadings before the cassation court were indispensable in order to clarify some purely technical issues and prove that she had standing to challenge the authority of the respondent company's representative, the Court reiterates that legal arguments, as well as those relating to technical factual matters, may be presented effectively in writing rather than orally (see, for example, *Pursiheimo v. Finland* (dec.), no. 57795/00, 25 November 2003; *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002; *Sutter v. Switzerland*, judgment of 22 February 1984, Series A no. 74, § 30; *Coorplan-Jenni GmbH and Hascic v. Austria*, no. 10523/02, § 63, 27 July 2006; *Salomonsson v. Sweden*, no. 38978/97, § 39, 12 November 2002; *Göç v. Turkey* [GC], no. 36590/97, § 51, ECHR 2002-V).

33. As to the applicant's argument that the procedure under Article 408 § 3 of the CCP fails the rule of law requirements, the Court first recalls that the Convention system does not envisage a mechanism for challenging legal provisions *in abstracto*, but only in relation to the specific application of such laws to the particular circumstances of an applicant's situation (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988,

Series A no. 145-B, p. 34, § 53). Moreover, the Court notes that, by complaining that the Supreme Court did not give reasons for its decision to dispense with an oral hearing, which decisions could not be appealed, the applicant detaches the impugned absence of a hearing in the cassation proceedings from the context of her civil dispute as a whole, and instead challenges the fairness of the procedures under Article 408 § 3 of the CCP in general. However, the question of whether or not fair trial safeguards have been met under Article 6 § 1 of the Convention can only be answered by examining the specifically impugned judicial proceedings as a whole (see *H. v. France*, judgment of 24 October 1989, Series A no. 162 A, p. 23, § 61). Moreover, the dispute over the appropriateness of an oral hearing is obviously not a dispute about the applicant's "civil rights". Nor could its outcome be considered to be directly decisive for the examination of the merits of the applicant's pecuniary action (see, *a contrario*, *Rizhamadze*, cited above, § 24; *Zander v. Sweden*, judgment of 25 November 1993, Series A no. 279-B, p. 38, § 22; *Moreira de Azevedo v. Portugal*, judgment of 23 October 1990, Series A no. 189, p. 17, § 66).

34. The Court considers that, even if the absence of a hearing in cassation does not in itself violate Article 6 § 1 of the Convention, a problem may still arise if the applicant is able to prove that, as a consequence, his or her right to adversarial proceedings and the equality of arms was undermined (see, *Rizhamadze*, cited above, § 41). In the present case, the sole complaint in this regard is that concerning the Supreme Court's omission to send the respondent company's reply to the applicant (see paragraph 28 above).

35. Indeed, in so far as the respondent company had submitted a reply to the applicant's cassation claim, the latter was, in principle, entitled to obtain knowledge of it before the delivery of a final decision (see, *a contrario*, *Rizhamadze*, cited above, § 42). However, the applicant failed to show the eventual utility of such an exchange. In particular, the Court observes that the relevant provisions of the CCP do not entitle the parties to submit any additional comments on each others' submissions, a matter undisputed by the applicant. Consequently, if the applicant had had prior knowledge of the respondent company's reply, she would not have been able to submit to the Supreme Court any further arguments with a view to influencing the forthcoming examination of her case.

36. Nevertheless, what is more important in the present case is that the Supreme Court itself did not take into account any of the respondent company's arguments when addressing the applicant's cassation claim (see paragraph 18 above). Consequently, the applicant cannot validly argue that, in the examination of her cassation claim under the written procedure, she was in a weaker position compared to the respondent company. Finally, since the applicant was not caught unaware by the Supreme Court's decision to dispense with an oral hearing, of which she had been duly informed prior

to the examination of the case (see, *Rizhamadze*, § 42), the Court agrees with the Government that she could have exercised her right under Article 83 § 1 of the CCP to consult the case file. In this way, she could have obtained knowledge of all the materials in the case, including the respondent company's submissions, if any, before the case was finally decided.

37. With due regard to the above, the Court considers that even if, as a matter of policy, it is preferable that the cassation court ensures the full exchange of all the parties' submissions before the delivery of a final decision, in the particular circumstances of the case at hand the Supreme Court's omission to forward the respondent company's reply to the applicant did not amount to a violation of the principles of equality of arms and adversarial proceedings.

38. In sum, there is nothing in the case file suggesting that the written procedure offered to the applicant by the Supreme Court in lieu of an oral hearing discloses any reasonable grounds to cast doubt on its overall fairness. Consequently, the Court concludes that the absence of an oral hearing before the cassation court did not constitute a violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the absence of an oral hearing in cassation admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 11 December 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

F. TULKENS
President